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FCC Mail Room

September 26, 2008

Federal Communications Commission Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(four copies)

Re: WT Docket No. 08-165
Petition by CTIA-The Wireless Group for an FCC Rule Clarifying Section 332(c)(7)(B)

Greetings:

The City of Dallas files these comments in response to CTIA's petition for FCC rules to preempt municipal regulation of the location of cell towers. The City of Dallas joins in the comments filed by the National Association of Telecommunication Officers and Advisors (NATOA) and the Texas Municipal League.

Cell Towers Already Have Favorable Ordinances

In most situations, the Dallas Development Code allows cell towers by right, with no additional review by the City Plan Commission or City Council. Under Dallas' zoning ordinance there are three types of cell towers: (1) mounted cellular antennas, (2) monopole cellular towers, and (3) other cellular towers.¹ Mounted cellular antennas are permitted by right in agricultural, single family, duplex, townhouse, cluster housing, multifamily-1, multifamily-2, and manufactured housing districts when attached to an existing structure that is currently occupied or was last occupied by a nonresidential use.² Mounted cellular antennas are permitted by right in multifamily-3, multifamily-4, office, retail, commercial service, industrial, central area, mixed use, multiple commercial, parking, and urban corridor-3 districts when attached to any existing structure.³

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- ¹ Dallas Development Code §51A-4.212(10.1)(A).
² Dallas Development Code §51A-4.212(10.1)(B)(i).
³ Dallas Development Code §51A-4.212(10.1)(B)(ii).

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Monopole cellular towers are permitted by right in commercial, industrial, and central area districts with residential adjacency review (RAR) required in commercial and industrial districts.⁴ Monopole cellular towers are permitted by right with RAR in limited office, mid-range office, general office, mixed use, and multiple commercial districts if the height of the tower does not exceed the maximum height for structures in that district; otherwise an SUP is required.⁵ Monopole cellular towers are permitted by right with RAR in the community retail district if the height of the tower does not exceed 65 feet; otherwise an SUP is required.⁶ Monopole cellular towers are permitted by right with RAR in the regional retail district if the height of the tower does not exceed 80 feet; otherwise an SUP is required.⁷ Monopole cellular towers are permitted by SUP only in all residential, neighborhood office, and neighborhood service districts.⁸

In the past five years, the City of Dallas has approved the location of 17 cell towers by right. When an SUP is required, the City of Dallas works cooperatively with telecommunication providers to quickly process zoning applications. In most cases, zoning applications for an SUP for a cell tower are processed within 60 days. In the past five years, the City of Dallas has processed 28 applications for specific use permits for cell towers, and of those applications only five were denied.⁹ As a result, there is no part of the City of Dallas that does not have adequate cell phone service.

Federal Law Already Provides a Remedy

If ever a zoning application was not processed quickly or was denied, federal law already provides a remedy. If a telecommunication provider was ever adversely affected by a decision of a city may appeal to district court.¹⁰ Since adoption of the Telecommunications Act of 1996, no telecommunications service provider has appealed a decision of the City of Dallas. Even though this appeal provision has not been used, it remains as recourse if a telecommunication provider felt that the City of Dallas did not timely or correctly decide an application.

⁴ Dallas Development Code §51A-4.212(10.1)(B)(iii). Residential adjacency review (RAR) is a staff review ensure compliance with Development Code requirements and adequate vehicular circulations. RAR review must be completed within 30 days. See Dallas Development Code §51A-4.803.

⁵ Dallas Development Code §51A-4.212(10.1)(B)(iii).

⁶ Dallas Development Code §51A-4.212(10.1)(B)(iii).

⁷ Dallas Development Code §51A-4.212(10.1)(B)(iii).

⁸ Dallas Development Code §51A-4.212(10.1)(B)(iii).

⁹ Four applications were withdrawn by the applicant. Two applications were not processed because the application was incomplete.

¹⁰ 47 U.S.C.A. §332(a)(7)(B)(v).

The Proposed Rule Interferes with State Open Meetings and Public Notice Requirements

Due to requirements imposed by state law, it is not possible to process zoning applications within 45 days. When a specific use permit is required, the zoning application must be processed and analyzed by city staff. Following staff review, the zoning application must be heard by the City Plan Commission.¹¹ At least 10 days prior to the City Plan Commission hearing, written notice of the hearing must be published in the newspaper and sent to every property owner within 200 feet.¹² City Plan Commission meets once per week.¹³ After the City Plan Commission hearing, the zoning application must be considered by the City Council.¹⁴ At least 15 days prior to the City Council hearing, written notice of the hearing must be published in the newspaper and sent to every property owner within 200 feet.¹⁵ City Council has voting agendas every two weeks. If there is any opposition, the zoning case may be postponed for 60 days before the City Plan Commission hearing and for 60 days before the City Council hearing.¹⁶ Processing of a zoning application typically takes 60 days. These procedures are typical of any city.

While the zoning process may seem cumbersome, it ensures that the applicant and the public have input and that the most socially desirable result is achieved. The proposed rule circumvents all oversight and public participation. The proposed 45 day deadline to process cell tower applications means the all cell towers will be deemed approved. The result is that no one - not citizens, not local officials, not even the FCC - will have any review or input on the location of cell towers.

The Proposed Rule is Contrary to Congress' Preservation of Zoning Authority

CITA's petition misconstrues 47 U.S.C.A. §253, which concerns franchises for the use of public rights-of-way.¹⁷ The more relevant regulations are instead contained in 47 U.S.C.A. §332, which concern mobile telecommunications services and regulation of the location of cell towers. In 47 U.S.C.A. §332, Congress preserved municipal zoning authority:

¹¹ Texas Local Government Code §211.007(b). Dallas Development Code §51A-4.701(b)(1).

¹² Texas Local Government Code §211.007(c). Dallas Development Code §51A-4.701(b)(5).

¹³ While the Dallas City Plan Commission meets once per week, in smaller cities it is common for the plan commission to meet only once or twice per month.

¹⁴ Texas Local Government Code §211.006(a). Dallas Development Code §51A-4.701(c).

¹⁵ Texas Local Government Code §211.006(a). Dallas Development Code §51A-4.701(c)(1).

¹⁶ Dallas Development Code §51A-4.701(e)(4).

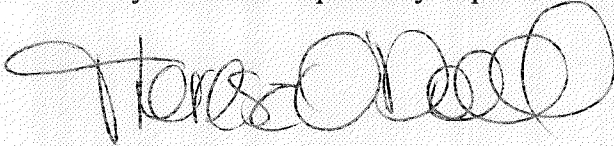
¹⁷ See 47 U.S.C.A. §253(c) ("Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation for telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.")

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decision regarding the placement, construction, and modification of personal wireless service facilities. . . . The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government . . . shall not unreasonably discriminate among providers of functionally equivalent services; and shall not prohibit or have the effect of prohibiting the provision of personal wireless services.¹⁸

The proposed rule is in direct conflict a statute passed by Congress.

Summary

The proposed rule corrects a problem that simply does not exist. Cell tower applications are routinely approved in a timely manner. As a result, the City of Dallas is well served by telecommunication providers, and cell towers are not harmful to surrounding land uses. The proposal removes all input and oversight of the location of cell towers. For these reasons, the City of Dallas respectfully requests that the petition be denied.



THERESA O'DONNELL
Director
Development Services
City of Dallas
1500 Marilla 5DN
Dallas, Texas 75201

c: Thomas P. Perkins, Jr., City Attorney
John Rogers, Assistant City Attorney
Don Knight, Assistant City Attorney
David Cossum, Assistant Director, Development Services

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Washington, D.C. 20554
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